STATE OF MICHIGAN

COURT OF APPEALS

JOHN TYLER MARTINDALE,

Plaintiff-Appellant,

v

JOANNA MARIE RUGGLES,

Defendant-Appellee.

UNPUBLISHED
January 26, 2016

No. 327117
Genesee Circuit Court
Family Division
LC No. 11-299442-DC

Before: SAAD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding sole physical custody of the minor child to defendant. We affirm.

This action arises from a dispute between defendant and plaintiff regarding custody of their minor child. The trial court ruled that the only established custodial environment was with plaintiff and, therefore, determined that defendant had the burden to prove by clear and convincing evidence that a change in custody was in the best interest of the child. The trial court held that defendant met this burden and awarded sole physical custody to defendant.

First, plaintiff argues that the trial court abused its discretion when it purportedly limited its consideration of best-interest evidence to events that occurred after the last custody order.

In general, an issue must be raised before, addressed, and decided by the trial court in order to be preserved for appellate review. *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). Neither plaintiff nor plaintiff's attorney ever objected to the trial court's supposed limitation of the evidence. Therefore, the issue is not preserved. See *Id*.

Normally, a trial court's discretionary rulings in a custody case are reviewed for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705, 716; 747 NW2d 336 (2008). "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* at 705. However, "[r]eview of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). An error affects substantial rights when it is outcome determinative. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

A trial court generally has authority to control and limit the presentation of evidence. See MRE 402; MRE 403; MRE 611. Although plaintiff claims the trial court improperly limited its consideration of best-interest evidence, there is no indication in the record that the trial court made a definitive ruling that limited the admission of best-interest evidence. The record also does not reflect plaintiff's counsel objecting to any such limitation of evidence.

Although the trial court stated that its *primary focus* was on events that occurred since the last custody order was entered, at numerous points throughout the evidentiary hearing the court noted that it was aware of the case history and that it was taking that history into account. At one point, the court stated that events relevant to the best-interest factors preceding the last custody order could be relevant, but that its focus would be on events occurring over the last couple of years since the last custody order was entered:

> I think we entered an initial order back in 2011 and I think there's been orders since then. I pretty much know some of that history.
>
> But I'm *more concerned about* what's happened since the last order was entered in October.
>
> * * *
>
> So, when I have to take a look at these custody disputes, *usually* we'll look at what's happened since the last order. So, that's *my focus*.
>
> Now, if you've got something you can offer the Court since then. Now, I recognize there's a history.
>
> * * *
>
> I'm interested in things [the witnesses] have direct knowledge of. Now, if there's some issues within the family going back, I don't have time to deal with that *unless it's relevant to one of the factors of the Child Custody Act.*
>
> So, my focus is mother has filed a motion for change of custody and I want to *zero in* on what's happened in the last couple years since the last order. [Emphasis added.]

There are a few points during the evidentiary hearing where the parties indicate that the evidence primarily being admitted was of events that occurred after the last custody order. However, as noted, there is no indication that the trial court ever prevented relevant best-interest evidence from being admitted because it occurred before that order. The trial court stated it was not interested in long-past events "unless it's relevant to one of the factors of the Child Custody Act," which clearly indicated that the trial court was willing to admit best-interest testimony of events that occurred prior to the last custody order.

Based on the record, the trial court did not prevent relevant evidence from being admitted or fail to consider all of the relevant evidence when making its best-interest determinations. Because there is no indication that any improper exclusion of evidence occurred, the trial court

did not abuse its discretion or commit clear error in its evidentiary rulings. See *Rivette*, 278 Mich App at 328.[1]

Second, plaintiff argues that the trial court abused its discretion when it awarded custody to defendant and that the ruling was based on factual findings that were against the great weight of the evidence.

Decisions in child custody cases are only reversed if the trial court's "findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." MCL 722.28; *Berger*, 277 Mich App at 716. "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). The abuse of discretion standard applies to the trial court's discretionary rulings, such as a custody determination. *Berger*, 277 Mich App at 705. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* (citation and quotation marks omitted). See, also, *Maier v Maier*, ___ Mich App ___, ___; ___ NW2d ___ (2015), slip op at 2. A clear legal error occurs if the court errs in choice of law, interpretation of law, or application of law. *Id.* Any error in a custody determination is subject to harmless error analysis. See *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996).

In reviewing the findings of the trial court, this Court will defer to the trial court's determinations of credibility, "given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Furthermore, "the trial court has discretion to accord differing weight to the best-interest factors" and "a trial court's custody decision . . . is entitled to the utmost level of deference." *Berger*, 277 Mich App at 705-706.

I. FACTUAL FINDINGS ON BEST-INTEREST FACTORS

Plaintiff argues that the trial court's factual findings under best-interest factors (a), (c), (d), (e), (g), and (h) were against the great weight of the evidence. See MCL 722.23.

A. THE LOVE, AFFECTION, AND OTHER EMOTIONAL TIES EXISTING BETWEEN THE PARTIES INVOLVED AND THE CHILD. MCL 722.23(a).

The trial court found this factor equally favored both parties. The trial court noted that "[b]oth of these parents deeply love this child," both sides provided "spirited advocacy" in the case, and each parent has "love, affection and other emotional ties" to the minor child. Plaintiff argues that the trial court failed to consider the minor child's love for each parent in its

[1] We do point out, however, that the standard announced in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), governs decisions under MCL 722.27(1)(c), not the best interest factors.

determination and claims that the minor child loves plaintiff more than the minor child loves defendant.

Testimony was presented about the minor child's strong bond with plaintiff. Sandra Coates, the minor child's great-grandmother, testified that the minor child "worships his dad. He does adore him." Coates further testified that "Tyler is a really good dad." Plaintiff testified that the minor child is "very clingy. He tells me he loves me. We tell each other we love each other all the time. He misses me." Plaintiff further testified that "I can feel the love and I know he feels my love as well. It's sweet."

However, a number of witnesses, including plaintiff, testified that the minor child and defendant have an affectionate relationship and that the minor child loves defendant. Deborah Ried, the minor child's grandmother, testified that defendant and the minor child "have a very loving relationship," noting that defendant participates in a lot of activities with the minor child including "digging for bugs," playing "all kinds of sports in the summer," and swimming. Deborah further stated that the minor child seems happy with defendant. Thomas Ried, the minor child's step-grandfather, testified that, "basically, I've observed Joanna is a good mom" and that she is very involved "with the school and with the youth group with the church and with the child." Defendant testified that the minor child looks to her for guidance and that she uses a color chart system to discipline the minor child. Defendant stated that she hugs and kisses the minor child "all the time," and that "he likes to play with me and joke around and he'll act like he's wiping it off. He thinks it's funny." Defendant testified that the minor child is very excited when he sees her and that he likes being with her and being at her house. Defendant further testified that the minor child loves her and loves "all his family. He's very loving." Plaintiff testified that the minor child loves his mother.[2]

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

B. THE CAPACITY AND DISPOSITION OF THE PARTIES INVOLVED TO PROVIDE THE CHILD WITH FOOD, CLOTHING, MEDICAL CARE OR OTHER REMEDIAL CARE RECOGNIZED AND PERMITTED UNDER THE LAWS OF THIS STATE IN PLACE OF MEDICAL CARE, AND OTHER MATERIAL NEEDS. MCL 722.23(c).

The trial court found this factor slightly favored defendant. The court noted that plaintiff has "certainly got a good, solid job. He's got adequate income to certainly provide for the material needs." The court further stated that defendant, "even though she doesn't have a high

[2] There was some testimony that the minor child does not like defendant. Larry Dalman, a private investigator, testified that he found a video on an iPad in which the minor child was asked "[d]o you like your mommy and the child said no." Amber Bradford, a mental health therapist, testified that, when she worked with the minor child, he talked about something that happened with his mom that made him feel "sad, scared, disgusted and confused using these emotion flash cards that I use regularly."

paying job, she is living with her family," which "appears to be an adequate home." Therefore, the court noted that "along with her parents," the minor child "is provided for properly" by defendant. The trial court also referenced some concerns that had been raised regarding immunizations, dental care, and hearing problems the minor child experienced. The court stated, "I'm not going to suggest from the evidence presented that father had ignored those problems," but noted that "there has in fact been an issue with the child's ears and hearing," although the court also noted that "the child had several cavities when the child was with mother." The court determined that, "on balance, maybe the grandparents get some credit too, I'd probably have to give a slight edge to mother on that factor." Plaintiff argues that defendant cannot provide for the minor child on her own and that the trial court's finding improperly rested on the support defendant receives from her parents.

Defendant does not make a great deal of money and does heavily rely on her parents for support. At the hearing, defendant testified that she would like to get a place of her own, but only if she "can find a job in medical billing and make more money." At the time of the trial court's ruling, defendant was working for her stepfather and earning minimum wage. Plaintiff manages five Allstate Insurance branches and made about $70,000 a year.

There was also testimony at the evidentiary hearing demonstrating that plaintiff cared for the minor child's medical needs. Defendant testified that plaintiff had a doctor put tubes in the minor child's ears when he needed them, after defendant and plaintiff discussed the minor child's hearing issues. Plaintiff testified that the minor child has a regular doctor and goes for regular checkups. Plaintiff further stated that the minor child sees an ear, nose, and throat specialist as well as a dentist.

However, there was also testimony suggesting that plaintiff did not adequately care for the minor child's medical needs, such as the fact that the minor child developed cavities while under plaintiff's care. Furthermore, defendant testified that plaintiff wanted to try alternative methods before putting tubes in the minor child's ears, even though defendant wanted to get the tubes put in immediately. Defendant testified that she took the minor child to the dentist when he was with her. Finally, there was testimony indicating that the minor child was well taken care of when with defendant. Deborah testified that the minor child has his own room, that the home is in a nice neighborhood, there is plenty of space, and defendant does not interact with the minor child in any concerning ways.

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

C. THE LENGTH OF TIME THE CHILD HAS LIVED IN A STABLE, SATISFACTORY ENVIRONMENT, AND THE DESIRABILITY OF MAINTAINING CONTINUITY. MCL 722.23(d).

Although the trial court stated it was "a little bit of a tough call," it ultimately determined that this factor was "pretty close to being equal, with maybe a slight edge" in favor of plaintiff because plaintiff had the minor child for a longer period of time. The court noted that defendant "has exercised a fair number of overnights," and "from the time we had the emergency hearing

in August and the child was placed with her, up until the child went back, she had the child for a pretty good length of time." The court noted that defendant "certainly showed that she's very capable" during that period of time. Plaintiff argues that the factor should have strongly favored him.

There was some testimony that defendant's parents interfere with plaintiff's communication with the minor child. Specifically, Deborah testified that she had stopped the minor child from Skyping with plaintiff on three occasions, when Deborah felt plaintiff was "put[ting] words in [the minor child's] mouth," got angry, and verbally demeaned Deborah and her husband Thomas, saying "what pieces of dirt we are. We're trash." However, Deborah testified that "was the last Skype that we had an issue. But he kept having his Skypes after that." Deborah said that she and her husband "prefer to be present when he Skypes because of the way Tyler talks to him and says things about us," and stated that she never allows the minor child to Skype plaintiff by himself.

There was also testimony that defendant struggles with depression when the minor child is not around, that defendant is a recovering drug user, and that defendant has been kicked out of her parents' home before, although not when she had parenting time with the minor child. Deborah testified that she attempted to evict defendant from her home because she "wanted [defendant] to start helping more around the house. We started arguing more." Deborah stated that she asked defendant to leave, and ultimately defendant "left voluntarily" but then returned after about two months. Defendant testified that she used to have a drug problem, but she has been free from drugs for almost three years.

Plaintiff lives in a large home with the minor child, whereas defendant lives in a small home with five dogs. Deborah testified that the home defendant lives in has three bedrooms, the main level of the home is 800 or 900 square feet, and the home also has a second story, where the minor child has his own room. Plaintiff testified that he rents a 5,300 square foot home, and that only the minor child shares the home with him.

However, Deborah testified that defendant's living environment with the minor child is stable and that the minor child has his own room, lives in a nice neighborhood, and has toys, books, clothes, and even a pool. Deborah testified that defendant and the minor child have a morning routine together before he goes to school and that the minor child has friends across the street. Defendant testified that the minor child has friends that he plays with outside and that the house is big enough for the minor child and is a nice house. Defendant testified that she does not plan on leaving the house "[u]nless I find a better job where I can get a nicer house." Defendant stated that the household is supportive.

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

D. THE PERMANENCE, AS A FAMILY UNIT, OF THE EXISTING OR PROPOSED CUSTODIAL HOME OR HOMES. MCL 722.23(e).

The trial court found this factor slightly favored defendant. The court noted that "dad is single," whereas defendant "is very fortunate to be at the present time living with her family." The court noted that the minor child had "loving grandparents" and "a proper home" with defendant. The trial court found, "just because of family support again, I would say that the parties might be equal. I may give a slight edge to mom simply because of the fact that there's so many family members there that are able to help out." Plaintiff argues that the trial court did not adequately consider the permanence of the family unit and, instead, favored defendant solely because of the number of family members that offer support to defendant.

As previously noted, there was testimony that defendant's parents had tried to evict her from their home, and at one point, defendant's uncle was also living in the home. However, defendant and plaintiff both testified that plaintiff was living with his fiancée until they broke up, and defendant also testified that she saw a video of plaintiff "making out" with another woman. Thus, both parties showed some instability, but defendant had more family in the child's life.

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

E. THE MENTAL AND PHYSICAL HEALTH OF THE PARTIES INVOLVED. MCL 722.23(g).

The trial court found this factor equally favored both parties, stating that "[b]oth of these parties are young. Both of them are working. I didn't find any significant issues there and would find them equal." Plaintiff argues that this finding was against the great weight of the evidence because defendant has significant mental health issues, whereas plaintiff has no such concerns.

There was testimony that defendant struggles with anxiety, depression, and drug-related issues. Defendant testified that she is "down and depressed when I don't have [the minor child]," that she has struggled with anxiety since she was young, that she began dealing with depression when she started using drugs, and that she had been on medication for anxiety. Defendant testified that she is no longer on medication for anxiety. Both Deborah and defendant testified that defendant has a very minimal social life consisting of church, work, and the minor child. However, plaintiff also testified that he had past issues with drinking and driving, as well as anxiety.

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

F. THE HOME, SCHOOL, AND COMMUNITY RECORD OF THE CHILD. MCL 722.23(h).

The trial court found this factor equally favored both parties. The trial court noted, "we're dealing with obviously a young child here with not a lot of school records." The court noted that the few school records indicated that the minor child did well in school with defendant and noted that there was no reason "to believe the child has not done adequately with dad. So, I don't find any significant edge there." Plaintiff argues that this finding was against the great

weight of the evidence because the minor child had school behavioral problems while under defendant's care but had no such problems while under plaintiff's care.

Defendant testified that, while under her care, the minor child was "disruptive in class" and, although he loves school and has many friends, had received detentions. However, plaintiff testified that the minor child only spent 12 days in school while under his care. Furthermore, Deborah testified that defendant helps the minor child with homework, attends activities at the minor child's school, and involves the minor child in community activities such as church youth group. Defendant testified that she takes the minor child to church, where he is involved in the youth group.

The facts do not clearly preponderate in the opposite direction of the trial court's finding. See *Shade*, 291 Mich App at 21. Therefore, the finding is not against the great weight of the evidence. See *id.*

G. THE WILLINGNESS AND ABILITY OF EACH OF THE PARTIES TO FACILITATE AND ENCOURAGE A CLOSE AND CONTINUING PARENT-CHILD RELATIONSHIP BETWEEN THE CHILD AND THE OTHER PARENT OR THE CHILD AND THE PARENTS. MCL 722.23(j).

This factor, according to the trial court, favored defendant. The trial court expressed a number of concerns regarding plaintiff's behavior in depriving defendant of parenting time and engaging in conduct that did not encourage a parent-child relationship between defendant and the minor child. The trial court noted that defendant "went without significant parenting time" for about four months and also "was denied a pretty fair amount of phone parenting time" and Skyping with the minor child. The court noted that after plaintiff moved, "whether it was done negligently or intentionally, his address was not provided for some period of time." The trial court stated that the presence of pornography on a tablet that plaintiff gave to his son was not relevant, particularly given that "I don't know enough of whether it could have been mom's porn, dad's porn, or whatever." The court did note that it was troubled by five videos taken by plaintiff. In one, the minor child "was asked who he liked and he said yes to several people and relatives and so forth and then he said no to mom." In another, "there was a discussion about a bed," although it wasn't clear what exactly was the purpose of the discussion. In another, there was questioning regarding "whether the child had slept with mother and there was no response to it. Then, finally, there was a response, words to the effect to the child, are you lying? Then I think there was another part why did you lie to the police or why did you say something to the police that 'it didn't happen?' Then the child responds because it didn't happen." The court noted that "[t]he fact that this child was being interviewed on tape just about the time that everybody knew there was going to be a contested custody case in which there's discussions about who do you like, a bed and sleeping with somebody, and why that child may have lied or didn't lie on tape, I find totally inappropriate." The court noted that this case "is one of the most flagrant cases I can think of." The court stated, "[w]e've got a dad that on two occasions attempted to change the jurisdiction, he has denied mother parenting time . . . he denied her some phone calls and so forth." The court indicated that "there was really simply no reason for it" and stated that no child should be placed in the position of being tape recorded under these circumstances. Plaintiff does not contest the trial court's finding.

II. CUSTODY DETERMINATION

Plaintiff argues that the trial court's overall custody determination was an abuse of discretion.

When modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c); *Hunter v Hunter*, 484 Mich 247, 259; 771 NW2d 694 (2009). Because the trial court ruled that the only established custodial environment was with plaintiff, defendant was required to demonstrate by clear and convincing evidence that a change in custody was in the minor child's best interests. *Hunter*, 484 Mich at 259. A trial court has discretion in determining how to weigh the best-interest factors. *Berger*, 277 Mich App at 705.

The testimony presented in this case was extensive. Some testimony reflects favorably on defendant, some reflects favorably on plaintiff, and some reflects negatively on both defendant and plaintiff. Of the best-interest factors that were relevant to this case, the trial court determined that five of the factors equally favored the parties, three favored defendant, and one favored plaintiff. Given that more best-interest factors weighed in favor of defendant, and given that the trial court may decide to accord different factors varying degrees of importance, we cannot conclude that the trial court's custody determination constituted an abuse of discretion. See *Berger*, 277 Mich App at 705. The trial court's decision is supported by the evidence in the record and is not "palpably and grossly violative of fact and logic." See *id.*

Affirmed.

/s/ Henry William Saad
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray